

(2000) 01 MAD CK 0084

In the Madras High Court

Case No : A.A. Order No's. 737 and 738 of 1993

K.K. Marthuthappan

APPELLANT

Vs

Kamala and 4 others/ Kittammal and 5 others

RESPONDENT

Date of Decision : 14-01-2000

Acts Referred:

Citation : (2000) 01 MAD CK 0084

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : M. Kalyanasundaram, for G. Sethuraman, for the Appellant; R. Meenalochani, Advocate and Mr. K. Padmanabhan for Mr. C. Ramesh Babu, Advocate for the 7th Respondent, for the Respondent

Final Decision : Dismissed

Judgement

K. Sampath, J.—In an accident involving the truck belonging to the appellant, two persons were killed whose dependants /heirs filed M.C.O.P. Nos. 70/87 and 25/88 before the Motor Accidents Claims Tribunal, Coimbatore (Principal Subordinate Judge) claiming compensation respectively in a sum of Rs. 3 lakhs and a sum of Rs. 50,000/-. M.C.O.P. No. 70/87 was filed by the dependants of one Ayyapparaj and M.C.O.P. No. 25/88 was filed by the dependants of one Palanisamy. C.M.A. No. 737/93 has been filed against M.C.O.P. No. 70/87 and C.M.A. No. 738/ 93 against M.C.O.P. No. 25/88. The vehicle involved was TNL 4556. The date of the accident was 14.4.1986. The Insurance Company was exonerated on the ground that there was breach of terms of the policy by carrying 50 passengers in a goods vehicle.

2. Mr. M. Kalyanasundaram, learned Senior Counsel for Mr. G. Sethuraman appearing for the owner of the vehicle in both the appeals, submitted that all the decisions exonerating the Insurance Company from liability in cases of alleged breach of terms and conditions of the insurance policy have been rendered u/s 95 of the Motor Vehicles Act, 1939, without reference to Section 96 which talks about the duties of the insurer. According to the learned Senior Counsel, this is a

case which the insurer cannot escape liability. So far as the owner is concerned, the submission of the learned Senior Counsel was that he had done everything within his power by entrusting the vehicle to a licensed driver and if he had done that he was not expected to bear the liability. The onus was on the Insurance Company to prove that the owner had committed breach of the terms of the policy and in the absence of such proof, the company cannot escape liability. In support of his several contentions, the learned Senior Counsel relied on a number of decisions;

1. Pushpababai Purshottam Udeshi and others v. M/s. Ranjit Ginning and Pressing Co. and another AIR 1977 SCC 1735-1977 ACJ 383 = 90 L.W. 73 S.N.
2. Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others,
3. Sohan Lal Passi Vs. P. Sesh Reddy and others,
4. Kanniappa Nadar Vs. Jayapandi and others,
5. The Thanjavur Taxi Drivers Industrial Cooperative Society Ltd. v. M. Vasantha, 1998 - I L.W. 665.
6. M/s. National Insurance Company Ltd. Madurai rep. by its Manager v. Adimoorthy -1999-I-L.W. 331
7. Amrit Lal Sood and Another Vs. Smt. Kaushalya Devi Thapar and Others,
8. New India Assurance Co. Ltd. v. Kamlaben, AIR 1993 Gujarat 171 (Full Bench).
9. Savitaben S. Veland v. Dhirajlal C. Kotak AIR 1998 Gujarat 266, and
10. B.V. Nagaraju Vs. M/s. Oriental Insurance Co. Ltd., Divisional Officer, Hassan,

3. Per contra Mr. K. Padmanabhan. representing the Insurance Company, submitted that in the instant case, the vehicle involved was admittedly a goods vehicle and under the policy condition, the accident to passengers in the goods vehicle was not required to be covered nor under the statute and the decision of the Supreme Court in Smt. Mallawwa Etc. Vs. The Oriental Insurance Co. Ltd. and Others, would squarely apply. Mr. Padmanabhan further submitted that it is not correct to say that the decisions against the owner had been rendered without reference to Section 96, in fact, Section 96 is subject to Section 95 as would be evident from the provisions themselves.

4. The learned Senior Counsel for the appellants relied on the judgment of a Bench of this Court in Kanniappa Nadar's case. In that case, persons (labourers) accompanied their parcels of paddy bags for loading and unloading in lorry. There was also no evidence that the owner authorised or permitted the owners of goods to travel or that driver was authorised to carry the owners of goods or of implied consent by the owner given to the driver or that they were gratuitous passengers. The Bench held that the burden of proof of breach of conditions of the permit or of the contract of insurance by the insured was on the Insurer. In holding like that the Bench referred to Sohan Lal Passi Vs. P. Sesh Reddy and

others, B.V. Nagaraju Vs. M/s. Oriental Insurance Co. Ltd., Divisional Officer, Hassan, and State of Maharashtra v. Vijaysm Shirke (1996 ACJ 1021). The learned Senior Counsel particularly referred to page 189 of Kanniappa Nadar's Case.

" Therefore, it is clear from the rule laid down in Sohanlal Passi's case that the burden of proving the breach of condition of permit or the contract of insurance by the insured is on the insurer, viz., the Insurance Company. In the instant case, that burden has not been discharged. Therefore, the Insurance Company cannot absolve from its liability to pay the compensation to the claimants. In the view we take, the contention of the learned counsel for the Insurance Company based on the exclusion clause contained in the contract of insurance has to fail."

5. In Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, , the facts were as follows: The driver of the truck left the truck with the engine in motion after handing over control of the truck to the cleaner who was not a duly licensed driver. The cleaner drove the vehicle and caused the accident. It was held that the Insurance Company was liable as the exclusion clause did not exonerate the Insurer as the insured had done everything in his power to keep, honour and fulfill the promise and was not guilty of a deliberate breach. The insured placed the vehicle in charge of a licensed driver, with express or implied mandate to drive himself, it could not be said that the insured was guilty of any breach. The Supreme Court gave three reasons for the exclusion clause not to operate namely; (1) On a true interpretation of the relevant clause which interpretation is at peace with the conscience of Section 96, the condition excluding driving by a person not duly licensed is not absolute and the promisor is absolved once it is shown that he has done everything in his power to keep, honour and fulfil the promise and he himself is not guilty of a deliberate breach.

(2) Even if it is treated as an absolute promise, there is substantial compliance therewith upon an express or implied mandate being given to the licensed driver not to allow the vehicle to be left unattended so that it happens to be driven by an unlicensed driver.

(3). The exclusion clause has to be "read down" in order that it is not at war with the main purpose of the provisions enacted for the protection of victims of accidents so that the promisor is exculpated when he does everything in his power to keep the promise.

6. The ratio in Skandia Insurance Company's case does not apply to the facts of the present case. Equally, the decision in Sohanlal Passi's case also will not apply to the facts of the present case. Sohanlal Passi was a case of a bus, the driver allowed the cleaner/conductor of the bus, also an employee of the appellant to drive it. Then the accident took place with a scooter, resulting in the death of the scooterist. It was held by the Supreme Court that the appellant was liable to pay compensation to the legal representatives of the victim since the bus was nevertheless being driven for the business of the appellant and not for personal

pursuit of the employee and it was also found that the negligent act was in the course of employment. The crucial test was held to be whether the initial act of the employee was expressly authorised and lawful. The Supreme Court further held that a case where the owner of the bus insured authorised his duly licensed driver to drive the vehicle but the driver allowed the cleaner/conductor of the bus to drive when the accident took place, the defence of breach of the condition under S. 96 (2) (b) (ii) of the Motor Vehicles Act was not available to the insurer and the insurer was liable u/s 96 (1). It was further observed by the Supreme Court that the rights of the legal representative of the victim should not be defeated on technical ground of mere contravention of the condition prescribed u/s 96(2)(b)(ii) irrespective of the fact that the insured had not allowed the vehicle to be driven by an unlicensed person but had instead taken precautions to comply with the condition by appointing a licensed driver. The defence u/s 96 (2) (b) (ii) was therefore not available to the insurer. The Supreme Court also observed that the whole concept of getting the vehicle insured by the Insurance Company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known.

7. In (The Thanjavur Taxi Drivers Industrial Co-operative Society Ltd. v. Vasantha) 1988-I-L.W. 665 in a case where passenger travelling in a goods van being injured or dying in the accident caused to the van, the plea of the Insurance Company that the passengers were unauthorised passengers in the goods van and that the policy did not cover the risk was negatived. The learned Judge relied on the judgment of the Supreme Court in Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravan and Others, B.V. Nagaraju Vs. M/s. Oriental Insurance Co. Ltd., Divisional Officer, Hassan, , Sohan Lal Passi Vs. P. Sesh Reddy and others, .

8. We may immediately refer to Nagaraju's case decided by the Supreme Court. In that case there was damage caused to the vehicle. It was contended on behalf of the Insurance Company that the owner had committed breach of carrying persons in a goods vehicle more than the number permitted in terms of the Insurance Policy. The Supreme Court held that the breach attributed to the owner cannot be said to be such fundamental breach so as to afford ground to the insurer to deny indemnification, unless there were some factors which contributed to the causing of the accident. The exclusion term of the insurance policy has to be read down to serve the main purpose of the policy.

9. One other decision relied on by the learned Counsel is by K. Govindarajan, J. in (M/s. National Insurance Company Ltd. Madurai v. Adimoorthy) 1999-I-L.W. 331. That was also a case where, in the goods vehicle, passengers were carried; it was contended by the Insurance Company that there was violation of terms

and conditions. There was no evidence to show that the owner of the vehicle wilfully allowed the vehicle for the purpose not allowed by the permit. It was held that the insurance company had not discharged the burden on it that insured committed breach of contract and therefore it could not be absolved of its liability from paying compensation. The learned Judge followed Kanniappa Nadar's case and also referred to Skandia Insurance Co. Ltd.'s Case.

10. A complete answer is furnished by the Supreme Court in (Smt. Mallawa v. Oriental Insurance Co. Ltd.) I.(1999) ACC 122= 1999- 2- L.W. 192 (SC). The vehicle was a goods vehicle, passengers were carried. It was held that the vehicle cannot be considered as a passenger vehicle on the basis of a single use or use on some stray occasions of that vehicle for carrying passengers for hire or reward. The test in such cases is whether there has been systematic carrying of passengers. The Supreme Court further held that it is not required that a policy of insurance should cover risk to the passengers who are not carried for hire or reward. As u/s 95 risk/hie/ to a passenger in a vehicle who is not carried for hire or reward is not required to be insured, the plea of the counsel for the Insurance Company held not liable under the requirements of the Motor Vehicle Act. The Supreme Court referred to Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, and observed that was held in that case was " with respect consistent with our interpretation of Section 95 of 1939 Act" and observed as follows:-

" What is important to be noted is that the legislature after providing generally in clause (b) of sub-section (1) in wide terms so as to include "any person" and every motor "vehicle" within its sweep, carved out certain exception by adding a proviso to that clause. By proviso (ii), it restricted the generality of the main provisions by confining the requirement to cases where "the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment". In absence of the proviso the main provisions would have included goods vehicles and all passengers whether carried for hire or reward or by reason or in pursuance of a contract of employment or otherwise. That is the reason why there is a reference to different classes of vehicles in proviso (i). It refers to "vehicle", Public Service Vehicle" and "goods vehicle". The words "any person" in the main provision would have included the employee of the person insured, and therefore an exception was made by enacting proviso (i) so as to restrict liability of the Insurer in respect of his employees. Both those exceptions were made as the legislature did not want to widen the liability of the insurer and the insured by making it more than what it was under the English Act, upon which Section 95 was based. As rightly pointed out by this Court in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, the requirement of compulsory coverage was limited then."

The Supreme Court further observed in para-

"Again turning back to proviso (ii), we find that it in clear terms restricted the

scope of the main provision by confining its application to that vehicle which is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment". In the first instance, the vehicle had to be a vehicle of that class in which passengers were carried. If that was not the intention of the legislature, it would not have used the phraseology "the vehicle is a vehicle in which passengers are carried" and would have simply provided that "except where passengers are carried for hire or reward...."

The Supreme Court quoted, with approval, the decision of the Orissa High Court in *New India Assurance Company Ltd. Vs. Kanchan Bewa and Others*, . The Orissa High Court in paragraph 19 of the judgment observed as follows:

"Being concerned with a beneficial legislation like the one at hand, we would have normally preferred liberal interpretation, but the question is whether, without any extra premium having been paid, the owner of a goods vehicle can claim indemnification from the insurer just because once in a year the goods vehicle had carried a passenger for hire or reward along with the goods. This would perhaps robe the third proviso dealing with coverage of contractual liability lame...."

In paragraph 22, the Orissa High Court further observed as follows:

"Thus, to find out whether an insurer would be liable to indemnify an owner of a goods vehicle in a case of the present nature, the mere fact that the passenger was carried for hire or reward would not be enough; it shall have to be found out as to whether he was the owner of the goods, or an employee of such an owner, and then whether there were more than six persons in all, in the goods vehicle and whether the goods vehicle was being habitually used to carry passengers. The position would thus become very uncertain and would vary from case to case. Production of such result would not be conducive to the advancement of the object sought to be achieved by requiring a compulsory insurance policy".

In view of what is stated above, it is not possible to accept the contentions raised by the learned senior counsel. The contention on behalf of the Insurance Company is therefore entitled to acceptance. The appeals have therefore to be dismissed as devoid of merits and accordingly dismissed. However there will be no order as to costs.